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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SOCIALIST WORKERS PARTY, et al.,

Plaintiffs,

v. 73 Civ. 3160

ATTORNEY GENERAL OF THE UNITED STATES, et al., OPINION

Defendants.

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GRIESA, J.

This opinion deals with objections made by the Government to various discovery requests of plaintiffs with respect to the Central Intelligence Agency and the National Security Agency. Because the materials deal in large part with information classified SECRET and TOP SECRET, the issues will be dealt with in two opinions -- this opinion, which will be made public; and a supplemental opinion which will be sealed.

There have been various sets of interrogatories, requests for documents, depositions, and court orders, designed to provide discovery regarding alleged illegal activities carried out by various Government agencies, including the CIA and NSA, against plaintiff organizations, the Socialist Workers Party (SWP) and the Young Socialist Alliance (YSA), and

their members. The activities which are the focus of the litigation include break-ins, electronic surveillance, and use of informants. In general, subject to claims of privilege, defendants have been directed to furnish plaintiffs with information and documents regarding any such activities carried out against plaintiffs or against any of 35 other persons who are said to have occupied leadership positions in the SWP or the YSA.

Central Intelligence Agency

I.

The CIA has furnished information and documents regarding some of its operations affecting plaintiffs. However, the CIA has objected to disclosing the details of certain other operations and activities, on the ground that such disclosure would be detrimental to the national security. The CIA claims that these matters should be protected under the state secrets privilege, and also under certain statutory provisions.[1]

II.

The CIA has furnished the Court in camera extensive information about the matters involved in the claim of privilege. The CIA has also provided the Court with the relevant documents for in camera inspection. On the basis of my review of these materials, I rule that the CIA has, as to all the points raised, asserted a valid claim of state secrets privilege. To the extent that any previous order of the Court or any discovery request of plaintiffs covers the operations or activities specified in the claim of privilege, I am directing that the CIA is not required to reveal any information or documents respecting such operations or activities.

III.

The most significant of the operations of the CIA covered by the claim of privilege is referred to in general terms in the public affidavit dated July 1, 1976 of the Director of Central Intelligence, George Bush. Paragraph 7 of this affidavit states:

> "7. The files of the CIA do contain information indicating that conversations of certain of the individual plaintiffs, and certain of the other individuals named in the Court's order of May 4, 1976, were

> overheard by means of electronic surveillance conducted abroad; and that certain other information, apart from conversations that were overheard, was acquired as a result of several surreptitious entries that were made into premises abroad as to which certain of the named plaintiffs, and certain of the other individuals named in the Court's order of May 4, 1976, had regular access or may have had a proprietary interest."

The details of these operations are disclosed in various affidavits submitted in camera by Mr. Bush and other persons from the CIA. The documents developed by the CIA in connection with these operations have also been submitted in camera.

Certain other operations and activities of the CIA as to which privilege is claimed are described in an in camera affidavit of Mr. Bush dated January 19, 1977.

## IV.

The CIA relies upon the state secrets privilege described in United States v. Reynolds, 345 U.S. 1 (1953). The CIA also argues that there is a "statutory privilege" under 50 U.S.C. §§ 403(d)(3) and 403g.

Section 403(d)(3) is derived from the National Security Act of 1947, and provides in pertinent part:

> "(d) Powers and duties.
>
> For the purpose of coordinating the intelligence activities of the several Government departments and agencies in the interest of national security, it shall be the duty of the [Central Intelligence] Agency, under the direction of the National Security Council--
>
> * * * *
>
> (3) to correlate and evaluate intelligence relating to the national security, and provide for the appropriate dissemination of such intelligence within the Government using where appropriate existing agencies and facilities: Provided, That the Agency shall have no police, subpena, law enforcement powers, or internal-security functions: Provided further, That the departments and other agencies of the Government shall continue to collect, evaluate, correlate, and disseminate departmental intelligence: And provided further, That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure; . . ."

Section 403g is derived from the Central Intelligence Act of 1949, and provides:

> "§ 403g. Same; protection of nature of Agency's functions.
>
> In the interests of the security of the foreign intelligence activities of the United States and in order further to implement the proviso of section 403(d)(3) of this title that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized

> disclosure, the Agency shall be exempted from the provisions of section 654 of Title 5, and the provisions of any other law which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency: Provided, That in furtherance of this section, the Director of the Office of Management and Budget shall make no reports to the Congress in connection with the Agency under section 947(b) of Title 5."

The Government argues that these statutory provisions create a privilege as to CIA "sources and methods," which exempts them from disclosure in a judicial proceeding.

It is clear that the statutes impose upon the Director of Central Intelligence the obligation to protect sources and methods from disclosure which would jeopardize the operations of the CIA in gathering foreign intelligence. The statutory provisions reflect the common understanding that intelligence operations require a high degree of secrecy in order to be effective. However, in my view, the statutory provisions do not, in and of themselves, create a privilege immunizing the CIA from judicially directed disclosure of information.

However, I hold that the judicially created "state secrets" privilege is applicable. See United States v. Reynolds, 345 U.S. 1 (1953). Although that case dealt with military secrets, the Supreme Court clearly recognized a privilege for other types of secrets whose disclosure would seriously jeopardize the national interest. The Court referred to "the privilege which protects military and state secrets." 345 U.S. at 7.

The authorities have not provided much definition of the state secrets privilege. However, certain language in the Reynolds case dealing with military secrets, is instructive.

> "In the instant case we cannot escape judicial notice that this is a time of vigorous preparation for national defense. Experience in the past war has made it common knowledge that air power is one of the most potent weapons in our scheme of defense, and that newly developing electronic devices have greatly enhanced the effective use of air power. It is equally apparent that these electronic devices must be kept secret if their full military advantage is to be exploited in the national interests." 345 U.S. at 10.

The Court went on to deal with the question of weighing the necessities of litigation against the claim of privilege.

> "Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." 345 U.S. at 11.

As a general proposition, it is safe to say that the gathering of foreign intelligence is just as important to the national security as the development of military weapons. Also, it is a truism that secrecy is the vital ingredient to effective intelligence operations.

Plaintiffs naturally argue that, if the CIA is permitted to avoid disclosure of the operations and activities in question, the result may well be to permit the CIA to hide illegal activities and avoid liability therefor. Plaintiffs argue strenuously that it is a denial of justice for the CIA to engage in illegal activities and then have them covered by a grant of privilege against disclosure in court.

It must be kept in mind, of course, that there has been no determination that the CIA activities in question were illegal. However, this is not a real answer to plaintiffs' contentions, since the real thrust of plaintiffs' position is that the allowance of the privilege prevents plaintiffs from even litigating, and attempting to prove, the illegality of these deeds of the CIA.

Nevertheless, under all the circumstances, and on the basis of my review of the information, I hold that the CIA has made out a valid claim of state secrets privilege. The revelation of the materials in question would, in my view, have a significance far beyond the disclosure of the specific activities of the CIA which related to plaintiffs. The release of these materials would threaten continuing CIA operations and relationships which have value to the national security in a variety of important ways.

National Security Agency

V.

In June 1976 plaintiffs requested an order which would have required the Director of the National Security Agency to produce all documents pertaining to electronic surveillance or interception of communications involving plaintiffs. Prior to this time certain affidavits were submitted to the Court in camera by the NSA contending that the agency had no information or documents relevant to the claims in the present action. On December 15, 1976 Donald H. Rumsfeld, Secretary of Defense, submitted an affidavit in camera opposing plaintiffs' discovery requests on the ground of privilege. In order to clarify the record, plaintiffs served a set of interrogatories on January 5, 1977 addressed to the NSA. The NSA responded on February 4, 1977. All these interrogatories were answered, except for 1(c) and 1(k), which requested information about any electronic surveillance or "maintenance of security lists or other lists of names." The NSA declined to make either an affirmative or negative response to the latter two interrogatories, and claimed privilege. In addition, the Government objected

to certain questions in the deposition of the CIA employee, Paul Haefner, on the ground that answers would reveal privileged information as to the NSA. These questions are at page 66, line 10, and page 91, line 14.

In addition to the in camera affidavits the Government has submitted, and made a part of the record in the present case, a public affidavit dated December 27, 1976 by the Secretary of Defense, originally filed in Spock v. United States, (76 Civ. 4457).

The NSA seeks to invoke the state secrets privilege. The NSA also claims a statutory privilege on the basis of Section 6(a) of Public Law No. 83-36, 73 Stat. 63 (May 29, 1959). The latter statute provides:

> "... nothing in this Act or any other law (including, but not limited to, the first section and section 2 of the Act of August 28, 1935 (5 U.S.C. § 654)) shall be construed to require the disclosure of the organization or any function of the National Security Agency, of any information with respect to the activities thereof, or of the names, titles, salaries or numbers of the persons employed by such agency."

As in the case of the CIA, the statutory provision undoubtedly is based upon a recognition of the need for secrecy in certain NSA operations, but

does not by its own force create a privilege against court order disclosure. However, in my view, the state secrets privilege does apply.

The public affidavit of the Secretary of Defense states that one of the missions of the NSA is "signals intelligence," involving the interception of international communications for the purpose of collecting foreign intelligence information. In the course of such collection, other communications not relating to what the NSA considers foreign intelligence, have been incidentally intercepted. During the years 1967-1973 the NSA disseminated to other government agencies information about the communications incidentally overheard. Both the public and in camera affidavits of the Secretary of Defense contend that any disclosure of the identity of specific individuals or organizations whose communications were intercepted by the NSA, or the disclosure of the dates or contents of such communications, would involve the revelation of information which would seriously jeopardize the signals intelligence mission of the NSA.

I hold that these contentions are amply established, and that the state secrets privilege applies to those matters sought to be protected by

the NSA. The need for secrecy far outweighs any utility that disclosure would have in the present litigation.

## Conclusion

For the reasons stated in this opinion and also in the supplemental sealed opinion, the objections of the CIA and the NSA to discovery of certain materials on the grounds of privilege are sustained.

So ordered.

Dated: New York, New York
June 10, 1977

Thomas P. Griesa

THOMAS P. GRIESA
U.S.D.J.

FOOTNOTE

1. The CIA has objected to Interrogatory 7 contained in the interrogatories dated April 14, 1976 addressed to all defendants. The CIA has also objected to the following items in a set of interrogatories dated August 27, 1976 addressed to the CIA:

1(b)(viii)(a) and 1(b)(viii)(b)
1(b)(ix) and 1(b)(x)
1(c)(i), 1(c)(ii), and 1(c)(iii)(a), 1(c)(iii)(b)
2(a)
5(a),5(b),5(c)
6(e)(i)
6(e)(ii)(a) and 6(e)(ii)(b)
6(f)
8
9
10(a)
11(b)(i), 11(b)(ii) and 11(b)(iv)
11(d)
13(b)(i) and 13(b)(iii)
14(b) and 14(c)
15(a) and 15(b)

The CIA has objected to the following items in a request for documents, dated September 3, 1976, addressed to the CIA:

(c)
(d)
(g)
(h)
(l)
(o)
(p)

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FOOTNOTE (continued)

On December 13, 1976 plaintiffs filed a motion to compel discovery. This motion sought responses to the items objected to in the interrogatories of August 27, 1976 and the document request of September 3, 1976. In addition, plaintiffs sought more complete answers to certain interrogatories, not objected to, which plaintiffs claimed had not been answered adequately. These interrogatories are:

1(d)(ii) and 1(d)(iii)
2(b)(iv) and 2(b)(xi)(d)